Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of **MCI COMMUNICATIONS SERVICES, INC.,** ***Complainant*,** **v.** **WIDE VOICE, LLC,** ***Defendant*.**	**Proceeding Number 19-121** **Bureau ID Number** **EB-19-MD-003**

REPLY IN SUPPORT OF FORMAL COMPLAINT OF MCI COMMUNICATIONS SERVICES, INC.

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INTRODUCTION AND SUMMARY

Wide Voice violated 47 C.F.R. §§ 51.907, 51.911, and 61.26(b) by failing to implement properly the final two stages of the Commission's transition to bill-and-keep for terminating switched access charges. In addition, Wide Voice's tariff includes two unlawful dispute-resolution provisions, which Wide Voice has attempted to raise as barriers to Verizon's disputes. Wide Voice's response to Verizon's Formal Complaint does not comply with the Commission's rules and fails on the merits.

Wide Voice's Answer first fails as a matter of procedure. The Commission's rules require fact pleading, not notice pleading. But Wide Voice's Answer is replete with general and boilerplate denials — which the Commission's rules prohibit — and Wide Voice repeatedly failed to supply factual information to support its denials and affirmatives defenses.

On the merits, Wide Voice ignores 47 C.F.R. § 51.911 — a key part of Verizon's argument — which makes clear that all seven steps in § 51.907 apply to *both* price cap ILECs and the CLECs that benchmark to their rates. Wide Voice also all but ignores the fact that its tariff does not apply Step 6 or 7 when Wide Voice owns *both* the tandem and end office switch through which terminating traffic is routed, even though Wide Voice concedes that the price cap ILECs to which it benchmarks must currently bill $0 for that traffic (*i.e.*, bill-and-keep). Wide Voice's arguments that bill-and-keep does not apply to traffic that it delivers to an end office owned by its CLEC affiliate cannot be squared with the plain language of the Commission's rules, *see* 47 C.F.R. § 51.907(g)-(h). Verizon acknowledges that applying those rules according to their plain terms will require prospective changes to both ILEC and CLEC tariffs, but that is no basis for not applying the rules the Commission promulgated.

Wide Voice's sole defense of its tariffed dispute resolution provisions is that Wide Voice copied tariff language that Northern Valley tariffed following the *Northern Valley Order*. But, in

declining to reject that tariff language, the Commission's Staff found only that the language was not "so patently unlawful as to require rejection," which is not an endorsement of the language as lawful. Staff's decision is also not binding on the Commission. Wide Voice makes no attempt to defend the substance of its dispute provisions, which impose the same kind of obligations that the Commission correctly found unlawful in the *Northern Valley Order*.

Wide Voice's attempts to interpose equitable defenses also fail. Equitable defenses are not permitted in a § 208 complaint proceeding and, under the filed-rate doctrine, cannot serve as the basis for Wide Voice to collect tariffed amounts. Wide Voice's argument that Verizon acted unlawfully in withholding disputed amounts is also wrong on the merits, because, as the Commission has held, a customer's failure to pay tariffed charges never violates the Communications Act.

Finally, although also Wide Voice pleaded five affirmative defenses, it pleaded no facts to support them. And those defenses are meritless.

ARGUMENT

I. WIDE VOICE'S TARIFF VIOLATES THE COMMISSION'S STEP-DOWN AND BENCHMARK RULES

Section 3.6.4 of Wide Voice's tariff is unlawful because it purports to authorize Wide Voice to charge terminating switched access rates that 47 C.F.R. §§ 51.907, 51.911, and 61.26 prohibit. Section 3.6.4 is void *ab initio*, and the Commission should declare it is unlawful.

A. Step 6 and Step 7 of the Commission's Step-Down Rules Apply to CLECs

Wide Voice's response is notable for what it does *not* say. Nowhere does Wide Voice address 47 C.F.R. § 51.911, which Verizon relied on in its Formal Complaint (¶¶ 30, 59, 78) and supporting Legal Analysis (at 10-11). In § 51.911, the Commission made clear that the various step-downs in § 51.907 — each of which is written in terms of actions that "Price Cap Carriers"

must take — also apply to the CLECs that benchmark their rates to those price cap ILECs. This rule thus implements the heading in the "Intercarrier Compensation Reform Timeline" in paragraph 801 of the *CAF Order*, as well as the substantive determination in paragraph 807, both of which make clear that the step-downs in the second column apply to "Price Cap Carriers *and CLECs that benchmark access rates to price cap carriers*."[1]

Wide Voice does not dispute that, even though it is a CLEC and not a price cap carrier, it was subject to Steps 1-5 of the transition to bill-and-keep, in § 51.907(b)-(f). Yet each of those subsections begins by stating what a "Price Cap Carrier shall" do.[2] Under Wide Voice's logic (Br. 12) that the reference to "Price Cap Carrier" in § 51.907(g) and (h) excludes CLECs, it and other CLECs that benchmark to those ILECs would not have been subject to Steps 1 through 5. That, obviously, was not the law. Steps 6 and 7, which also begin by stating what each "Price Cap Carrier shall" do,[3] must be read the same way — they include not only price cap ILECs, but also the CLECs that benchmark to those ILECs.[4]

Wide Voice also says virtually nothing about the situation where Wide Voice owns *both* the tandem switch and the end office switch through which switched access traffic is terminated. Wide Voice offers only the unexplained assertion, in a footnote, that Verizon's argument that Step 7 requires a CLEC to "set a rate of $0.00 if they own the end office and the tandem switch"

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[1] Report and Order and Further Notice of Proposed Rulemaking, *Connect America Fund*, 26 FCC Rcd 17663, ¶ 801 fig. 9 (2011) ("*CAF Order*") (emphasis added); *see also id.* ¶ 807 (intercarrier compensation reforms "will generally apply to competitive LECs via the CLEC benchmarking rule" reflected in § 61.26).

[2] 47 C.F.R. § 51.907(b)-(f).

[3] *Id.* § 51.907(g)-(h).

[4] *See*, *e.g.*, *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881, 889 (2019) (rejecting interpretation that would give the same words "different meanings in consecutive, related sentences within a single statutory provision").

is "irrational[]." Wide Voice Br. 15 n.49. But Wide Voice acknowledges that, when a price cap ILEC owns both the tandem switch and end office switch, that ILEC could charge no more than $0.0007 per minute under Step 6 and no more than $0 under Step 7 — that is, that traffic is subject to bill-and-keep. *See id.* at 9. Thus, Wide Voice's position — not Verizon's — would result in "discriminatory" and "disparate" treatment between CLECs and ILECs. *Id.* at 12, 14.

Section 3.6.4 of Wide Voice's tariff is thus illegal, unlawful, and void *ab initio* because it violates §§ 51.907, 51.911, and 61.26 — it authorized Wide Voice to charge more for traffic terminated through both a Wide Voice tandem switch and end office switch than Steps 6 and 7 authorized. Nothing in the *Level 3 Order*[5] suggests that a CLEC is not subject to Steps 6 and 7 in that situation. And, as noted above, Wide Voice offers essentially no defense of its tariff language as applied to that scenario.[6]

B. Step 6 and Step 7 Apply to Traffic Terminated at a Price Cap LEC or CLEC End Office When That Traffic Is Routed Through a Tandem Switch Owned by the Terminating Carrier's Office Affiliate

Wide Voice's primary argument defending its tariff ignores the plain language of the regulations implementing Steps 6 and 7. It argues that price cap ILECs have filed tariffs under which they charge standard tandem switching rates for calls delivered to their CLEC affiliates, so

[5] Memorandum Opinion and Order, *Level 3 Commc'ns, LLC v. AT&T Inc.*, 33 FCC Rcd 2388 (2018) ("*Level 3 Order*").

[6] Verizon's argument is not, as Wide Voice suggests (at 21-22), that Wide Voice's tariff is independently unlawful because Wide Voice tariffed so-called "Affil PCL" rates that would never apply. Rather, Verizon noted that Wide Voice drafted its tariff in a way to make it appear — on a cursory review — as though it was properly implementing Steps 6 and 7 when it was not doing so. And Verizon argued further that, to the extent the Commission were to conclude that Wide Voice's filing of such a tariff rendered it ambiguous, the Commission should resolve that ambiguity against Wide Voice and find that its tariff implemented Steps 6 and 7, properly interpreted, and therefore that Wide Voice violated its tariff in billing Verizon its higher standard rates rather than the lower "Affil PCL" rates. Verizon Formal Compl. ¶¶ 63-64; Verizon Br. 14-15.

Wide Voice should also be able to charge its standard tandem rates for calls delivered to its CLEC affiliates (though it denies having any). But Step 6 provides that "[e]ach Price Cap Carrier shall establish, for interstate and intrastate terminating traffic traversing a tandem switch that the terminating carrier *or its affiliates* owns, Tandem-Switched Transport Access Service rates no greater than $0.0007 per minute."[7] Step 7 similarly requires bill-and-keep (*i.e.*, $0) for traffic "traversing a tandem switch that the terminating carrier *or its affiliate* owns."[8] The plain meaning of these rules — interpreted in light of § 51.911 — is that the $0.0007 and $0 rates apply to all traffic terminating to an end office owned by a price cap ILEC *or a CLEC* that benchmarks to a price cap carrier, if the traffic traverses a tandem switch that is owned either by the terminating carrier itself or by one of its affiliates.

Wide Voice's reliance (Br. 9-12) on the Commission's *Level 3 Order* is misplaced. As Verizon showed (Br. 11-12), the Commission in the *Level 3 Order* never considered the arguments Verizon makes here based on §§ 51.911 and 61.26, because Level 3 never made them. The *Level 3 Order* was instead focused on traffic routed through an AT&T ILEC tandem to an AT&T CMRS or VoIP affiliate, which are scenarios this Formal Complaint does not implicate. To the extent the *Level 3 Order* contains dicta that would not apply Steps 6 and 7 to traffic going through a price cap ILEC tandem to an affiliated CLEC end office, it is wrong and directly contrary to the plain language of the regulations. The Commission "is not free to ignore or violate its regulations while they remain in effect."[9]

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[7] 47 C.F.R. § 51.907(g)(2) (emphasis added).

[8] *Id.* § 51.907(h) (emphasis added).

[9] *Nat'l Envtl. Dev. Ass'n's Clean Air Project v. EPA*, 752 F.3d 999, 1011 (D.C. Cir. 2014). And the Supreme Court recently reiterated that agencies do not receive deference to their interpretations of their own regulations unless, among other things, the regulation is "genuinely ambiguous, even after a court has resorted to all the standard tools of interpretation." *Kisor v.*

Verizon recognizes that some price cap ILEC tariffs may not follow the plain language of the Step 6 and 7 regulations. If the Commission grants this Formal Complaint, those ILEC tariffs would have to be revised prospectively, no differently from Wide Voice's tariff. Accordingly, there will be no disparate treatment between price cap ILECs and CLECs. But Wide Voice went well beyond implementing the dicta in the *Level 3 Order*. Under Wide Voice's tariff, as shown above, Wide Voice claims that Steps 6 and 7 do not apply even when a call goes through a Wide Voice tandem and Wide Voice end office. In contrast, Verizon affiliated CLECs — like Verizon's ILECs — apply Steps 6 and 7 in their tariffs where calls go through both a tandem and end office that the Verizon CLEC owns.[10]

C. The Native American Telecom Entities Are Wide Voice's Affiliates

Native American Telecom, LLC, and Native American Telecom — Pine Ridge, LLC (together, "Native American Telecom") are Wide Voice's affiliates under the definition of affiliate in the Communications Act, through both ownership and control. *See* Formal Compl. ¶¶ 15-18. In response, Wide Voice asserts that Native American Telecom is not its affiliate and

Wilkie, --- S. Ct. ---, 2019 WL 2605554, at *7 (U.S. June 26, 2019). No such genuine ambiguity is found in § 51.907(g) or (h).

[10] Verizon attaches to this reply tariff excerpts from Verizon affiliated CLEC XO Communications, LLC and MCImetro Access Transmission Services Corp., which set all terminating tandem rates at a maximum of $0.0007 beginning in July 2017 (Step 6) and $0 in July 2018 (Step 7) in accordance with the Commission's step-down rules. *See* Ex. 10, § 6.3.3 (XO Communications, LLC, Tariff FCC No. 1, effective July 1, 2017); Ex. 11, § 6.3.3 (XO Communications, LLC, Tariff FCC No. 1, effective July 3, 2018); Ex. 12, § E.4.3 (MCImetro Access Transmission Services Corp., Tariff FCC No. 1, effective July 31, 2017); Ex. 13, § E.4.3 (MCImetro Access Transmission Services Corp., Tariff FCC No. 1, effective July 31, 2018). In addition, Wide Voice attached to its Answer excerpts of Verizon ILEC tariffs that show Verizon's ILECs set a rate of $0 for traffic that terminates from a Verizon ILEC tandem to a Verizon ILEC end office. *See* WV_000265 (Verizon ILEC tariff setting rates of $0 for traffic "Terminating to Telephone Company End Offices"); WV_000268 (same); WV_000271-WV_000273 (same).

also that its affiliate relationship is irrelevant at the liability stage of Verizon's complaint. Wide Voice fails to meet its burden on the first point and is wrong on the second.

First, the Commission's regulations require Wide Voice to "respond specifically to all material allegations of the complaint,"[11] with factual support for each denial.[12] "General denials are prohibited."[13] Wide Voice's obligation to provide specific responses to all of Verizon's factual allegations extends to those included in footnotes 30 and 32 of Verizon's Formal Complaint.[14]

Wide Voice did not meet the Commission's fact pleading standard with respect to Verizon's allegations that it is affiliated with Native American Telecom. Wide Voice's Answer is filled with general denials[15] and factual assertions without any supporting facts, whether documents or declarations.[16] As one example, Verizon alleged — based on facts contained in the federal court complaint of Jeffrey Holoubek, the longtime former Director of Legal Affairs

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[11] 47 C.F.R. § 1.726(b); *id.* § 1.721(d) (facts in claims or defenses "must be supported by relevant evidence").

[12] Report and Order, *Amendment of Rules Governing Procedures To Be Followed When Formal Complaints Are Filed Against Common Carriers*, 12 FCC Rcd 22497, ¶ 82 (1997) ("*Rules Amendment Order*") ("[S]trict adherence to the Commission's fact pleading requirements is necessary."); *id.* ¶ 120 (describing differences between notice pleading in federal court and Commission's fact pleading standard).

[13] 47 C.F.R. § 1.726(b).

[14] Wide Voice contends (Answer at 1) that § 1.721(d) relieves it from the obligation to respond to factual allegations in the footnotes of Verizon's Formal Complaint. That regulation says no such thing.

[15] *See*, *e.g.*, Wide Voice Answer ¶ 15 ("Wide Voice denies that Wide Voice Communications, Inc. is a relevant non-party."); *id.* ¶ 17 ("Wide Voice . . . denies the allegations contained in paragraph 17 to the extent they mischaracterize and otherwise misstate public documents.").

[16] *See*, *e.g.*, *id.* ¶ 15 ("Wide Voice denies that Patrick Chicas currently owns 10% of Wide Voice, LLC."). Wide Voice provided no declaration or affidavit from Mr. Chicas or documents evidencing Wide Voice, LLC's ownership structure during the periods at issue in Verizon's Formal Complaint.

for both Wide Voice, LLC and WideVoice Communications Inc.[17] — that the two Wide Voice entities are "comprised of the exact same employees" who have "the same duties and responsibilities."[18] Wide Voice responded only with a general "deni[al]" of all allegations that rely on what it described as "the unsubstantiated allegations of former employee Jeffrey Holoubek."[19] That breezy denial does not satisfy the Commission's fact pleading standard — especially because Wide Voice knows whether its employees are (or were), in fact, also employees of WideVoice Communications and had the same duties and responsibilities for both companies.

Publicly available documents belie the one fact that Wide Voice offered. Wide Voice submitted a declaration from its CEO Andrew Nickerson, in which he states that, "[f]or all times relevant to Verizon's Formal Complaint, I did not have any control over" WideVoice Communications or Native American Telecom.[20] But, in an October 2018 filing with the Nevada Secretary of State, WideVoice Communications listed Mr. Nickerson as its sole officer and CEO, President, Secretary, and Treasurer.[21] And, in a March 2019 federal court filing, Native American Telecom admitted that WideVoice Communications has a greater than 10% ownership interest in Native American Telecom.[22] Neither Wide Voice nor Mr. Nickerson even

[17] Mr. Holoubek is representing himself in the federal court case; he signed his Complaint and, as an attorney, is subject to Rule 11 and rules of professional conduct.

[18] Verizon Formal Compl. ¶ 15.

[19] Wide Voice Answer ¶ 15.

[20] Nickerson Decl. ¶ 4 (WV_000001-WV_000002). In its brief (at 8), Wide Voice asserts that Mr. Nickerson "stepped down" as President of Native American Telecom in "early 2017," but Mr. Nickerson's declaration does not actually say that.

[21] *See* Verizon Formal Compl. ¶ 15 & n.19; Ex. 14 (October 2018 filing).

[22] *See id.* ¶¶ 16 n.25, 17 n.36 (citing that answer). A copy of that answer is attached as Exhibit 15.

acknowledges the Nevada or South Dakota filings, much less tries to explain away the contradictions between Mr. Nickerson's statement and the clear documentary evidence of Wide Voice's indirect ownership and control over Native American Telecom. Because Wide Voice failed to plead facts in response to Verizon's substantial allegations showing both common ownership and/or control between Wide Voice and Native American Telecom, the Commission should accept those allegations as true.[23]

Second, Wide Voice is wrong to claim (Br. 8) that whether it has CLEC affiliates is "of no import" in the liability phase of this proceeding. Verizon seeks a ruling that, among other things, orders Wide Voice to file a new tariff that applies bill-and-keep to traffic that goes through a Wide Voice tandem to either a Wide Voice end office or an end office owned by a Wide Voice CLEC affiliate.[24] Verizon seeks the latter part of that ruling because of the evidence available to it that shows that Wide Voice in fact has such CLEC affiliates.

Wide Voice asserts (Br. 7) that Verizon's "real motivation" for describing the affiliate relationship between Wide Voice and Native American Telecom "is to somehow publicly besmirch Wide Voice and distract the Commission." But the existence of those affiliates is, as shown above, a necessary factual predicate for part of the relief Verizon seeks in the liability phase, not a distraction. And Wide Voice does not explain why a recitation of the public evidence of its affiliate relationship could "besmirch" Wide Voice's character. Regardless, because Wide Voice refused to stipulate to its affiliate relationship with Native American Telecom — and with WideVoice Communications — Verizon was required to plead the publicly

[23] 47 C.F.R. § 1.726(d) ("Averments in a complaint . . . are deemed to be admitted when not denied in the answer.").

[24] Verizon Formal Compl. ¶¶ 6, 59, Prayer for Relief (c)-(d).

available information that is evidence of the common ownership and control among these companies.

II. WIDE VOICE'S TARIFF INCLUDES TWO UNLAWFUL DISPUTE RESOLUTION PROVISIONS

Wide Voice's tariff also contains two unlawful dispute resolution provisions, which purport (1) to unilaterally limit the statute of limitations and (2) to require Verizon to pay disputed amounts in order to raise a dispute with Wide Voice. The Commission has already held that substantively identical provisions are unlawful and should hold that both provisions are unlawful as well.

Wide Voice's entire defense of these two provisions is that it copied them from the tariff that Northern Valley filed after the *Northern Valley Order*[25] and that Commission Staff did not suspend those provisions. But that is no defense of the lawfulness of either provision. First, Staff found only that Northern Valley's dispute provisions were not "so patently unlawful as to require rejection"[26] — that is not the same as finding they are *lawful*. Second, that was a Staff-level decision and Staff decisions do not bind the Commission.[27]

Wide Voice offers no substantive defense of its dispute provisions. Wide Voice does not deny that § 2.10.4(A) purports to make its bills "binding" on a customer unless Wide Voice

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[25] Memorandum Opinion and Order, *Sprint Commc'ns Co. v. N. Valley Commc'ns, LLC*, 26 FCC Rcd 10780 (2011) ("*Northern Valley Order*").

[26] *See* WV_000243 (Public Notice, *Protested Tariff Transmittal Action Taken*, DA 11-1393 (FCC rel. Aug. 12, 2011)).

[27] *See*, *e.g.*, Order on Reconsideration, *Allen Leeds*, 22 FCC Rcd 1508, ¶ 11 (WTB 2007) ("[S]taff statements neither bind the Commission nor prevent [the Commission] from enforcing Commission regulations. The Commission has specifically held that parties who rely on staff advice or interpretations do so at their own risk.") (cleaned up); Memorandum Opinion and Order and Forfeiture Order, *Liability of Jacor Broadcasting of Colorado, Inc.*, 12 FCC Rcd 9969, ¶ 5 (1997) ("informal staff approvals do not bind the Commission").

receives written disputes within a "reasonable period of time." As Verizon showed, § 2.10.4(A)'s reference to a "reasonable period" is vague and therefore violates 47 C.F.R. § 61.2(a), which requires "all tariff[s] . . . [to] contain clear and explicit explanatory statements." Wide Voice offers no response. And, if "reasonable period" means anything less than two years, Wide Voice's tariff provision "purports unilaterally to bar a customer from exercising its statutory right to file a complaint within th[e] limitations period," no different from the 90-day time limit the Commission struck down in the *Northern Valley Order* and that the D.C. Circuit upheld.[28]

Similarly, Wide Voice does not deny that § 2.10.4(B) requires a customer, when it "submit[s] a good faith dispute," to "tender payment . . . for any disputed charges" at or before the time the dispute is made, so long as the dispute "relate[s] to traffic in which the Customer transmitted an interstate telecommunications to [Wide Voice's] network." But the *Northern Valley Order* made clear that it is unreasonable to require "everyone to whom Northern Valley sends an access bill to pay that bill, no matter what the circumstances . . . , in order to dispute a charge."[29] The Commission's identification of the situation in which "no services were provided [by Northern Valley] at all" was merely one "*example*" of when it would be unlawful to require payment in order to raise a dispute.[30] Because a carrier violates federal law when it bills tariffed charges in violation of the terms of its tariff[31] or files a tariff in violation of a Commission ruling

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[28] *Northern Valley Order* ¶ 14; *see N. Valley Commc'ns, LLC v. FCC*, 717 F.3d 1017, 1019-20 (D.C. Cir. 2013) (holding that the Commission "permissibly interpreted the statute to preclude the 90-day provision of the tariff").

[29] *Northern Valley Order* ¶ 14.

[30] *Id.* (emphasis added).

[31] *See* 47 U.S.C. § 203(c).

that such a tariff is unlawful,[32] the *Northern Valley Order* properly held that it is unreasonable for a carrier to require payment as a condition of disputing that carrier's unlawful actions.

Although Wide Voice asserts (Br. 26) that § 2.10.4(A) and (B) are "industry standard," neither the Commission nor any court has ever held this language is lawful. On the contrary, in the only federal court case that appears to have presented this question, a Magistrate Judge recommended to the district court that it find the dispute provision unlawful.[33] On review, the district court noted that it was "strongly inclined" to agree, because the tariff language "seems completely contrary to what the FCC said in the *Northern Valley* case" and "would give a[ ] LEC carte blanche to abuse the system by blackmailing buyers into paying for all erroneous charges, no matter how egregious."[34] But, because the district court found that AT&T had complied with the dispute resolution provisions, it did not rule on the lawfulness of those provisions.[35]

III. VERIZON DID NOT ENGAGE IN UNLAWFUL SELF-HELP

Wide Voice argues, throughout its response, that Verizon engaged in unlawful self-help by disputing Wide Voice's invoices and withholding payment from Wide Voice based on those disputes. That argument is procedurally improper, lacks merit, and is irrelevant to the matter at issue in this proceeding: the unlawfulness of Wide Voice's tariff.

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[32] *See* Order on Reconsideration, *AT&T Corp. v. Iowa Network Servs., Inc. d/b/a Aureon Network Servs.*, 33 FCC Rcd 7964, ¶ 15 (2018) ("*Aureon Recon. Order*") ("A filing that contains rates that the carrier is not permitted to charge does not even meet the preliminary standard for a legal tariff filing . . . .").

[33] *See* Report and Recommendation, *Great Lakes Commc'n Corp. v. AT&T Corp.*, 2014 WL 2866474, at *25 (N.D. Iowa June 24, 2014).

[34] *Great Lakes Commc'n Corp. v. AT&T Corp.*, 2015 WL 12551192, at *11 n.19 (N.D. Iowa June 8, 2015).

[35] *See id.* at *11.

A. As an initial matter, Wide Voice has not demonstrated that it may plead equitable defenses in a § 208 complaint proceeding.[36] Nor could it. The filed-rate doctrine prohibits Wide Voice from using equity as a basis to collect tariffed amounts. Indeed, a long string of federal district courts have correctly applied this Commission's decisions and the filed-rate doctrine to hold that equity is unavailable to a carrier seeking to enforce the terms of its tariff.[37]

B. As to the merits, Wide Voice is wrong that Verizon's refusal to pay disputed amounts violates the Act. As the Commission has recognized, when a long-distance carrier purchases switched access services from a local exchange carrier, it is acting "in its role as a customer," not a carrier.[38] Only a common carrier can violate the Act,[39] and the Act confirms that a company "shall be treated as a common carrier . . . only to the extent that it is engaged in providing telecommunications services."[40] Therefore, a customer's failure to pay tariffed charges — whatever the customer's reason — *never* violates the Act, which is why the Commission has held plainly that "*a failure to pay tariffed access charges does not constitute a*

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[36] Memorandum Opinion and Order, *AT&T Corp. v. All Am. Tel. Co.*, 30 FCC Rcd 8958, ¶ 13 (2015) ("*All American II*") (defendants did not demonstrate "that they may plead equitable defenses in a Section 208 complaint proceeding" and therefore rejecting that defense); Memorandum Opinion and Order, *AirTouch Cellular v. Pac. Bell*, 16 FCC Rcd 13502, ¶ 17 (2001) (rejecting equitable defenses in § 208 complaint proceeding); Order, *Marzec v. Power*, 15 FCC Rcd 4475, ¶ 12 n.35 (Enf. Bur. 2000) ("*Marzec v. Power*") ("[T]he Commission has expressed doubt that the unclean hands defense is available in section 208 proceedings in the first place.").

[37] *See, e.g.*, *All Am. Tel. Co. v. AT&T Corp.*, 328 F. Supp. 3d 342, 350 (S.D.N.Y. 2018); *Eltopia Commc'ns, LLC v. MCI Commc'ns Servs., Inc.*, 2016 WL 8504774, at *1, *3 (W.D. Wash. Apr. 28, 2016).

[38] Memorandum Opinion and Order, *All Am. Tel. Co. v. AT&T Corp.*, 26 FCC Rcd 723, ¶ 12 (2011) ("*All American I*").

[39] 47 U.S.C. §§ 206-208.

[40] *Id.* § 153(51).

violation of the Act."[41] Instead, non-payment gives rise to a tariff collection action — in essence, a claim for breach of a federal contract[42] — over which the Commission has repeatedly and correctly held that it lacks jurisdiction.

Wide Voice's reliance on *Peerless Network, Inc. v. MCI Communications Services, Inc.* fails for two reasons.[43] First, on appeal, the Seventh Circuit vacated the *Peerless* district court's entry of judgment and disagreed with the premise that customers have to pay disputed amounts in order to dispute a carrier's bill on the ground that the carrier violated the terms of its tariff.[44] Second, to the extent the *Peerless* district court found that customers have to pay and then dispute when the challenge concerns the *lawfulness* of a CLEC's tariff, the court was relying on rate-of-return caselaw that has been superseded by the Commission's benchmark regime.[45] The dispute that Verizon presents here — that Wide Voice filed tariffs that violate Steps 6 and 7 and, therefore, are tariffs that the Commission prohibited Wide Voice from filing — is a challenge not

[41] *All American I* ¶ 12.

[42] *Cahnmann v. Sprint Corp.*, 133 F.3d 484, 487 (7th Cir. 1998) (describing nature of tariff collection actions under federal law).

[43] 2018 WL 1378347 (N.D. Ill. Mar. 16, 2018).

[44] *Peerless Network, Inc. v. MCI Commc'ns Servs., Inc.*, 917 F.3d 538, 544-45 (7th Cir. 2019). If the Seventh Circuit had agreed with the district court's conclusion — that is, when a customer claims a LEC violated its own tariff, the customer has to pay then dispute — the Seventh Circuit would have affirmed. Instead, the Seventh Circuit vacated the district court's entry of judgment and held that Verizon's claim that Peerless violated its own tariff was a defense that would "undercut any amount that Verizon purportedly owes Peerless." *Id.* at 544.

[45] *Compare Peerless*, 2018 WL 1378347, at *19 (citing and discussing *Frontier Commc'ns v. AT&T Corp.*, 957 F. Supp. 170 (C.D. Ill. 1997)), *with Aureon Recon. Order* ¶ 13 (holding that *Frontier* line of cases, where customers challenged the reasonableness of rates set under the rate-of-return regime, are "inapposite" because those cases "involved complaints challenging rates that neither customers nor the Commission could determine were unlawful at the time the tariff was filed but that ultimately resulted in rate-of-return violations").

only to the lawfulness of the tariffs, but also to their legality.[46] Verizon thus properly withheld payment of disputed amounts pending the resolution of this dispute, just as, in *Aureon*, the Commission identified no issue with AT&T's reliance on its dispute as to the legality and lawfulness of Aureon's tariff as the basis for withholding 75% of the amounts Aureon had billed.[47]

IV. WIDE VOICE'S AFFIRMATIVE DEFENSES FAIL TO MEET THE PLEADING STANDARDS, ARE NOT SUPPORTED BY EVIDENCE, AND LACK MERIT

Wide Voice asserts five, one-sentence affirmative defenses. Each of Wide Voice's sparse defenses falls well short of the Commission's fact pleading standard and should be rejected on that basis alone. Should the Commission reach the substance of any of Wide Voice's defenses, they all lack merit.

To plead an affirmative defense under the Commission's rules, a party must plead those defenses "fully and with specificity."[48] But *none* of Wide Voice's affirmative defenses identifies or cites any facts, evidence, or declarations in support. Instead, each is recited in conclusory fashion. To cite two examples, Wide Voice's second affirmative defense states that "Verizon breached Wide Voice's tariff by failing to follow the dispute resolution process in Wide Voice's tariff." That is the whole affirmative defense — one sentence with no specification of which tariff provision Verizon breached or factual allegations as to how or when Verizon breached the (unnamed) provision. Wide Voice's third affirmative defense is similarly bare-bones, alleging that "Verizon comes to the Commission with unclean hands because it engaged in lawful

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[46] *Aureon Reconsideration Order* ¶ 15 ("A filing that contains rates that the carrier is not permitted to charge does not even meet the preliminary standard for a legal tariff filing . . . .").

[47] *Id.* ¶ 2 n.7.

[48] 47 C.F.R. § 1.721(b); *Rules Amendment Order* ¶ 70 (answers "are required to contain complete statements of fact, supported by relevant documentation and affidavits.").

self-help when it unilaterally withheld payment, refusing to make payments on Wide Voice's invoices, after receiving services from Wide Voice" — with no supporting citations to any documents or evidence. Wide Voice's other defenses are no more detailed.

If the Commission should reach the merits of any of Wide Voice's affirmative defenses, they all fail.

Affirmative Defense #1, Waiver: Wide Voice alleges (Answer at 15) that "Verizon waived any claims related to Wide Voice's tariff" because it did not file a petition challenging the tariff before it took effect.[49] Wide Voice is wrong. Even LEC tariffs "that take effect on seven or 15 days' notice and are 'deemed lawful' may be subsequently challenged at the Commission through the section 208 complaint process."[50] It is commonplace for the Commission to find a tariff unlawful in response to a formal complaint rather than in initial petitions to suspend or reject a tariff.[51]

Affirmative Defense #2, Dispute Resolution Provisions: Wide Voice alleges (Answer at 15) that "Verizon breached Wide Voice's tariff by failing to follow the dispute resolution process in Wide Voice's tariff." That defense fails for multiple reasons. *First*, as explained above, Wide Voice's dispute resolution procedures are themselves unlawful, so the alleged failure to comply with them cannot bar Verizon's complaint. *Second*, as the Commission's Staff

[49] Wide Voice says in a footnote (Br. 5 n.13) that it "expects" that "any and all" other disputes Verizon has regarding Wide Voice's tariff must be raised in this Formal Complaint proceeding or else are waived. But Wide Voice offered no citation or support for that proposition. Verizon is not aware of any authority that would prevent it from challenging other aspects of Wide Voice's tariff (or its billing pursuant to its tariff) in subsequent proceedings.

[50] Order, *GS Texas Ventures, LLC*, 29 FCC Rcd 10541, ¶ 5 (PPD 2014) ("*GS Texas Ventures*").

[51] *See*, *e.g.*, *Aureon Recon. Order* (considering formal complaint under § 208); Memorandum Opinion and Order, *AT&T Servs., Inc. v. Great Lakes Comnet, Inc.*, 30 FCC Rcd 2586 (2015) (same).

has held, a carrier cannot use its dispute resolution procedures to preclude a customer from presenting to the Commission a challenge to the lawfulness of the tariff in a § 208 proceeding.[52] Regardless, Verizon raised its disputes regarding Wide Voice's violation of the step-down rules in a manner that fully communicated to Wide Voice the basis for Verizon's dispute, which is all those dispute provisions require.[53]

Affirmative Defense #3, Unclean Hands: Wide Voice alleges (Answer at 15-16) that Verizon's claim is barred because Verizon "comes to the Commission with unclean hands" as a result of having purportedly engaged in "unlawful self-help," citing the *Peerless* decision. This purported defense fails for multiple reasons. *First*, the Commission has never recognized a defense of unclean hands in the context of a formal complaint proceeding.[54] *Second*, even if an unclean hands defense were available, Wide Voice fails to cite any facts or legal authority to show that Verizon meets the standard for unclean hands or that such a finding, if substantiated, would somehow bar the Commission's determination of whether Wide Voice's tariff is lawful.[55]

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[52] *GS Texas Ventures* ¶ 6 ("In light of our finding that the arbitration requirement contained in the proposed tariff conflicts with section 208, we further find that GS Texas Ventures' inclusion of section 2.10.4.I in its proposed tariff is unjust and unreasonable under Section 201(b) of the Act.").

[53] As the federal district court in South Dakota held just last week, a potential complainant acts in good faith when it withholds payment while it conducts a thorough review or audit, even though it reports the results of that audit and the bases of its dispute to the carrier months later. *See Midcontinent Commc'ns v. MCI Commc'ns Servs., Inc.*, No. 4:16-cv-04070-KES, at 32 (D.S.D. July 2, 2019) (Dkt. 89) ("Verizon conducted research and reviewed invoices, the LERG, and the tariffs. Verizon also cited an FCC order. Verizon's dispute was made with 'honesty in fact' and thus good faith.").

[54] *Marzec v. Power* ¶ 12 n.35.

[55] *Id.* (finding affirmative defense of unclean hands was irrelevant to determination of whether defendant in a formal complaint proceeding violated the Act); *see also* Memorandum Opinion and Order, *Qwest Commc'ns Co. v. Sancom, Inc.*, 28 FCC Rcd 1982, ¶ 27 (Enf. Bur. 2013) (citing Memorandum Opinion and Order, *AT&T Corp. v. Bell Atlantic-Pa.*, 14 FCC Rcd 556, ¶ 95 (1998) (questioning whether the equitable doctrine of unclean hands should ever bar a § 208 complaint)).

Third, Verizon did not act unlawfully in withholding disputed amounts, as described above, and the *Peerless* district court decision is not only wrongly decided but also did not determine any claim or defense of unclean hands.

Affirmative Defense #4, Good Faith: Wide Voice alleges (Answer at 16) that "Verizon cannot in good faith claim that Wide Voice[ ] acted unreasonably . . . when its own ILEC affiliates charge rates identical to Wide Voice." Here again, Wide Voice cites no authority for the availability of a "good faith" equitable defense in the context of a § 208 proceeding. Nor does Wide Voice cite facts to show that Verizon acted in bad faith — *i.e.*, that it acted with an intent to defraud — when it disputed Wide Voice's bills.[56] Indeed, it is Wide Voice — not Verizon — which, in billing standard rates for traffic that traverses a Wide Voice tandem and Wide Voice end office, seeks an unfair advantage over the benchmark ILECs. Any suggestion that Verizon is seeking disparate treatment for its own ILEC affiliates is wrong. And, if the Commission grants Verizon's Formal Complaint, Verizon's price cap ILEC affiliates will ensure their tariffs comply with the decision.

Affirmative Defense #5, Declaratory Judgment: Wide Voice alleges (Answer at 16) that "Verizon is not entitled to a declaratory ruling as it did not properly submit a petition to the Commission in connection with that request pursuant to 47 C.F.R. § 1.2." Wide Voice only makes this claim for Count III in Verizon's Formal Complaint.[57] But the only declarations Verizon seeks in Count III are "that Step Six and Step Seven apply to Wide Voice, a CLEC that benchmarks to the tariffs of price cap ILECs, and not only to those price cap ILECs themselves,"

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[56] *Black's Law Dictionary* 166 (10th ed. 2014) (defining "bad faith"); *Peerless*, 2018 WL 1378347, at *21 (discussing bad faith standard and finding, after full fact discovery, the existence of no credible evidence that Verizon acted in bad faith in disputing Peerless's bills).

[57] Wide Voice Answer ¶¶ 87-89.

and "that Wide Voice must amend its tariff to comply with Step Six and Step Seven immediately."[58] Those are exactly the declarations that would result from a ruling for Verizon on its § 208 complaint and finding that Wide Voice's tariff is unlawful because of its violation of Steps 6 and 7.

CONCLUSION

The Commission should find that Wide Voice has violated 47 U.S.C. § 201 and declare illegal, unlawful, and void *ab initio* § 3.6.4 of Wide Voice's FCC Tariff No. 3 and declare unlawful § 2.10.4(A) and § 2.10.4(B) of that tariff. The Commission should accordingly enter a declaratory ruling in Verizon's favor and award monetary damages to Verizon for amounts that Wide Voice unlawfully billed and collected.

[58] Verizon Formal Compl. ¶ 89.

Respectfully submitted,

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